INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Nature of the case	1
Date of the judgment and application for appeal	4
State statute, the validity of which is involved	4
Statutory provisions sustaining jurisdiction	4
Cases believed to sustain jurisdiction	10
Exhibit "A"—Opinion of the Court of Criminal Appeals in the case at bar	12
Exhibit "B"—Opinion of the Court of Criminal Appeals in the case of Ex parte Jack Frye	13
Exhibit "C"—Opinion of the Court of Criminal Appeals on motion for rehearing in the case at bar	25

Table of Cases Cited.

Connally v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322	8
Connolly v. *Union Sewer Pipe Company*, 184 U. S. 540	8
Holmes v. *Jenson*, 14 Pet. 540, 10 L. Ed. 579	10
Lanzetta v. *New Jersey*, 306 U. S. 451, 83 L. Ed. 888	8
New York, ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184	10
Panel v. *Patterson*, 24 Fed. Supp. 915	8
Truax v. *Corrigan*, 257 U. S. 312	8
United States v. *Reeves*, 92 U. S. 214, 23 L. Ed. 563	8
Wallace v. *Currin*, 95 Fed. (2d) 856, 83 L. Ed. 441	8

Statutes Cited.

Code of Criminal Procedure of Texas, Article 819	4
Constitution of the State of Texas, Article 5, Section 4	4
Constitution of the State of Texas, Article 5, Section 5	4
Constitution of the United States, 14th Amendment	8, 9, 10
Judicial Code, Section 237a, as amended by the Act of January 31, 1928 (45 Stat. L. 54, 45 Stat. 466, 28 U. S. C. A. 344, 861a and 861b)	9, 10
Revised Statutes of Texas, Vernon's Annotated Penal Code, Chapter Ten, Article 1621-b, known as House Bill 800, passed by the 47th Legislature of Texas	4
Revised Civil Statutes of Texas, 1925, Articles 1801-1810, inclusive	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1187

TED SANFORD,

Appellant,

vs.

NORFLEET HILL, SHERIFF OF HARRIS COUNTY, TEXAS.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 21,885.

EX PARTE TED SANFORD, *Appellant.*

STATEMENT OF THE GROUNDS OF JURISDICTION.

In support of the appellate jurisdiction of the Supreme Court of the United States in this cause, appellant, Ted Sanford, respectfully shows:

I.

That this cause originated by the return of a purported indictment in the Criminal District Court No. Two, of Harris County, Texas, wherein the appellant was charged

with the offense of attempting to prevent and preventing Allen Guidry by the use of force and violence and by threats of the use of force and violence on July 29, 1941, from engaging in a lawful vocation, to-wit: waiter at the Two Points Cafe, as an employee of said Cafe.

And further charging appellant in said purported indictment, with the offense of acting in concert with Mrs. Virgil Marion McRae, Margie Pajalick, and Blackie Markham in Harris County, Texas, on or about July 29, 1941, of assembling at a certain place, to-wit: 839 McCarty Street in Harris County, Texas where then and there existed a labor dispute, to-wit: a controversy between the Two Points Cafe and two or more of the employees of said Cafe, concerning the terms and conditions of employment and the appellant, acting in concert with Mrs. Virgil Marion McRae, Margie Pajalick, and Blackie Markham, did, by the use of force and violence and threats of the use of force and violence, attempt to prevent and did prevent Allen Guidry from engaging in a lawful vocation, to-wit: waiter at Two Points Cafe, as an employee of said Cafe. All in violation of the provisions of Revised Statutes of Texas, Vernon's Annotated Penal Code, Chapter Ten, Article 1621-b, known as House Bill 800, passed by the 47th Legislature of Texas.

That after his arrest and incarceration, appellant presented to the Honorable Langston G. King, Judge of the Criminal District Court No. Two of Harris County, Texas, a petition praying that a writ of habeas corpus issue to the end that he might be discharged from custody. In said petition appellant contended that the indictment was void because the statute upon which it was predicated was violative of the Fourteenth Amendment of the Constitution of the United States and particularly Section One thereof, because said State penal statute abridged the privileges

and immunities of citizens of the United States and deprives persons of life, liberty or property without due process of law and denies to persons within the jurisdiction of said State penal statute the equal protection of the laws.

A hearing was had in said petition and it was thereat adjudged that the statute and the indictment were valid. Appellant was thereupon remanded to the custody of the Sheriff of Harris County, Texas, to await trial upon said indictment. That appellant, Ted Sanford, timely prosecuted in the manner and form provided by law, an appeal from the judgment of the Criminal District Court No. Two of Harris County, Texas, to the Court of Criminal Appeals of Texas. That on December 10, 1941, the Court of Criminal Appeals of Texas, after having heard and considered said cause entered its judgment in all things affirming the judgment of the Criminal District Court No. Two of Harris County, Texas. That thereafter appellant, within the time and in the manner required by law, filed his motion for rehearing in the Court of Criminal Appeals of Texas, which was heard and considered by the Court of Criminal Appeals of Texas and said motion for rehearing was in all things overruled by the Court of Criminal Appeals of Texas on January 28, 1942, and the order of the Court of Criminal Appeals of Texas affirming the judgment of the Criminal District Court No. Two of Harris County, Texas, was allowed to stand as the final judgment of the Court of Criminal Appeals of Texas. That the Court of Criminal Appeals of Texas is the Court of last resort in all cases of a criminal nature prosecuted under the laws of the State of Texas and it is the highest Court of the State of Texas which could or can decide this cause. That the Court of Criminal Appeals of Texas is constituted the Court of last resort and the highest court of criminal jurisdiction under the Constitution and laws of the State

of Texas by the provisions of Article 5, Sections 4 and 5 of the Constitution of Texas and Articles 1801-1810 inclusive of the Revised Civil Statutes of Texas 1925. That the judgment of the Court of Criminal Appeals of Texas upon the overruling of Appellant's Motion for Rehearing herein on January 28, 1942, is final and conclusive as of that date except it be reversed by the Supreme Court of the United States (Article 819, Code of Criminal Procedure of Texas).

That the judgment affirming this cause was a final judgment within the meaning of Section 237 of the Judicial Code. That the time for making the appeal began to run on January 28, 1942 and this Petition for appeal is presented on the — day of April, 1942.

II.

This case is one in which the validity of a statute of the State of Texas, to-wit:

Revised Statutes of Texas, Vernon's Annotated Penal Code, Chapter 10, Article 1621-b, Acts of 1941, House Bill 800, passed by the 47th Legislature of Texas, which statute was approved on the 4th day of April, 1941, and provided on its face that it should become effective as of that date, is drawn in question upon the ground that said statute abridges the "privileges and immunities" clause and is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment of the United States Constitution and is repugnant to the "freedom of assembly" clause of the First Amendment of the United States Constitution.

The statute is set out in full in the original opinion of the Court of Criminal Appeals of Texas in the Jack Frye case which is referred to in that Court's original opinion

in this Case, the Jack Frye opinion being made a part of the record of this appeal.

For the convenience of the Court the statute in full here follows:

"H. B. No. 800.

"ANTI-STRIKE LAW—LABOR DISPUTES.

"An Act making unlawful the use of force or violence or threats to thereof to prevent or attempt to prevent any person from engaging in any lawful vocation and providing penalties for the violation thereof; making it unlawful for any person acting in concert with other persons to assemble and prevent by force or violence any person from engaging in a lawful vocation and making it unlawful to encourage and aid such unlawful assemblage, and providing penalties for the violation thereof; defining the term 'labor dispute'; making the provisions of this Act cumulative of existing laws; and providing severance or saving clause; and declaring an emergency.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

"Section 1. It shall be unlawful for any person by the use of force or violence to prevent or to attempt to prevent any person from engaging in any lawful vocation within this state. Any person guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the State Penitentiary for not less than one year nor more than two (2) years.

"Section 2. It shall be unlawful for any person acting in concert with one or more other persons to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person, acting either by himself, or as a member of any group or organization, or acting in concert with one or more other persons, to promote,

encourage, or aid any such unlawful assemblage. Any person guilty of violating this Section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one year, nor more than two years.

"Section 3. The term 'labor dispute' as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms of conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

"Section 4. The provisions of this Act shall be cumulative of all other existing Articles of the Penal Code upon the same subject, and in the event of a conflict between existing Articles and the provisions of this Act, then and in that event the provisions, offenses, and punishments set forth herein shall prevail over such existing Articles.

"Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative, or invalid by any Court of competent jurisdiction, the same shall not affect nor invalidate the remainder of this Act.

"Section 6. The fact that it is essential that industries of this State be protected from strikes and that all citizens of this State be protected from the use of violence in labor disputes creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and it is hereby suspended, and this Act shall be in full force and effect from and after its passage, and it is so enacted."

It is the contention of this appellant that this State penal statute by making an arbitrary and unreasonable classification of persons similarly situated whereby a distinction in punishment between present and former employees of

the same employer for the commission of an offense of the same character and degree and committed at the same place and time; and in basing such classification upon the existence of a particular kind of labor dispute at or near the place where the assault occurred; and in adopting a basis of classification which bears no reasonable relationship to the purpose which the State is competent to effect, viz., persons with a lawful vocation in Texas only and those without a lawful vocation in Texas only; and in discriminating arbitrarily and unreasonably between persons in similar circumstances, involving the same offense; and by attempting to protect all classes of industries in Texas from all kinds and character of strikes by increasing the penalty for an assault from what it was and is under the general assault statute of Texas to a felony under this statute if the assault is committed at or near any place where a particular kind of labor dispute exists even though the accused had no knowledge of or interest in such labor dispute; and by making the classification of persons depend upon the place where the assault occurs, although the proximity of such place to the location of the particular kind of labor dispute is unknown to the accused, rather than upon the degree or seriousness of the crime; and in not limiting the jurisdiction of the penal statute to assaulted persons having employment or desiring employment at the unidentified and unknown place and location where the particular labor dispute exists; and in arbitrarily and unreasonably discriminating between citizens of the United States having lawful vocations in Texas and citizens of the United States having lawful vocations in other States but not in Texas but who happen to be in Texas at the time and place of the assault; and in denying equal protection to citizens of States other than Texas but who are in Texas at the time and place of the assault; and in failing to provide on its face that guilt of accused depends upon his specific intent or upon some degree of knowledge on his part in com-

mitting the assault to violate the purpose of the statute and in it being couched in terms so vague and indefinite as to adequately inform a person of common intelligence of the nature of the crime and what acts will constitute a violation of such statute; and in it being so ambiguous that persons are required at the peril of their liberty and property to speculate on its meaning; and in it being so broad in its terms as to include all possible offenders and yet so indefinite as to leave to courts and enforcement officers the privilege of deciding who should be detained and prosecuted and who should be set at large; and in its language being so broad as to impair if not entirely prohibit, the effective exercise of the right to strike and picket for a legitimate objective, is violative of the guaranties of the "due process", "equal protection" and "privileges and immunities" clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States and further that this Penal Statute of Texas in unreasonably restricting and to all practical intents and purposes denying, the right of peaceful assembly guaranteed by the First Amendment to the United States Constitution.

In these contentions Appellant relies upon the following decisions of the United States courts, to-wit: *Truax* v. *Corrigan*, 257 U. S. 312; *Connally* v. *General Construction Company*, 269 U. S. 385 (388), (70 L. Ed. 322 (327)); *Wallace* v. *Currin*, 95 F. (2d) 856 (affirmed 83 L. Ed. 441); *Lanzetta* v. *State of New Jersey*, 83 L. Ed. 888 (306 U. S. 451); *United States* v. *Reeves*, 92 U. S. 214 (23 L. Ed. 563); *Panel* v. *Patterson*, 24 Fed. Supp. 915; *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540.

III.

The final decision of the Court of Criminal Appeals of Texas, the court of last resort in all criminal cases in the State of Texas, is in favor of the validity of said penal statute.

The foregoing questions under the Fourteenth Amendment to the Constitution of the United States were raised in the Criminal District Court No. Two of Harris County, Texas (the trial court) on the Petition for a writ of habeas corpus, as appears upon the face of said Petition, which is made a part of the record on appeal to the Supreme Court of the United States, and were overruled by the trial court as appears from the judgment of the trial court, remanding the Appellant to the custody of the sheriff. The Petition for writ of habeas corpus was transmitted to the Court of Criminal Appeals of Texas and became a part of the record of that court upon the appeal, and these same questions were raised in the Court of Criminal Appeals of Texas, said Petition for writ of habeas corpus constituting the basis upon which the issues were joined in that court, involving the violation by said statute of the Fourteenth Amendment to the United States Constitution.

The judgment of the Court of Criminal Appeals of Texas in this case shows upon its face that these questions were raised, overruled and decided adversely to Appellant's contentions by that court in this case and said penal statute of Texas was held by that court to be not violative of the Fourteenth Amendment to the United States Constitution.

The parts of the record herein referred to are by the settled practice of this State matters of record in the Court of Criminal Appeals of Texas and will be included in the transcript on appeal to the Supreme Court of the United States as a part thereof.

IV.

In accordance with the rules of the Supreme Court of the United States, Petitioner respectfully shows that this case is one in which under the legislation in force at the time the Acts of January 31, 1928 (45 Stat. L. 54), was

passed, to-wit: under Section 237(a) of the Judicial Code (28 U. S. C. A., Section 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The pertinent provisions of Section 237(a) of the Judicial Code are as follows:

> "A final judgment or decree in any court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant of the Constitution, treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The remedy of writ of error under the foregoing section has been abolished and an appeal substituted (45 Stat. 54; 45 Stat. 466; 28 U. S. C. A. Sections 861(a) and 861(b)).

V.

The following cases are believed to sustain the appellate jurisdiction of the Supreme Court of the United States in this case:

New York, Ex Rel. Bryant v. *Zimmerman,* 73 L. Ed. 184 (278 U. S. 63);
Holmes v. *Jennson,* 10 L. Ed. 579 (14 Pet. 540).

VI.

The cases cited under Section Two hereof, to which reference is here made, are believed to sustain the Petitioner's contention that the statute in question in this case denies to Petitioner the rights guaranteed under Section One of the Fourteenth Amendment to the Constitution of the United States.

It Is Therefore, respectfully submitted that this case involves a substantial Federal question under the Constitu-

tion of the United States and that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code.

Respectfully submitted,

(Signed) W. A. Combs,
(Signed) Sewall Myer,
Attorneys for Appellant, Ted Sanford.

Frank Campbell Fourmy,
Of Counsel.

EXHIBIT "A".

Appeal from Harris County.

No. 21,885.

Ex parte TED SANFORD.

Opinion.

Appellant was indicted by the Grand Jury of Harris County charged with having violated Art. 1621b of the Penal Code, as amended by Chapter 100, Acts of the 47th Legislature, Regular Session.

A capias was issued by the Clerk of the Criminal District Court of said county and relator was taken into the custody of the sheriff and confined. He immediately applied to the Hon. Langston King, Judge of the Criminal District Court No. 2 of Harris County, for a writ of habeas corpus, claiming that he was being illegally restrained of his liberty because the law which he was charged with having violated was in contravention of the Fourteenth Amendment to the Federal Constitution, as well as Sections 3, 8, 10, 13, 19 and 27 of Article 1 of the Constitution of Texas, and Article 6 of the State Penal Code. Upon a hearing of the habeas corpus he was remanded to the custody of the sheriff, from which judgment he appealed to this court.

It is apparent from the above statement that this case involves the same questions as that of Ex parte Jack Frye, No. 21,883, this day decided. The disposition which we have made of that case also disposes of this one. Therefore, it is not necessary to reiterate what we have said in that case. A mere reference thereto is sufficient.

It is therefore ordered that the judgment of the trial court be and the same is in all things affirmed.

KRUEGER, *Judge.*

(Delivered Dec. 10, 1941.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

Endorsements: No. 21,885. Ex parte Ted Sanford, Appellant, *vs.* The State of Texas, Appellee. Appeal from Harris County. Affirmed. Opinion by Krueger, Judge. Filed in the Court of Criminal Appeals, Austin, Texas, 12/10/41, Olin W. Finger, Clerk.

EXHIBIT "B".

Appeal from Harris County.

No. 21,883.

Ex parte JACK FRYE.

Opinion.

Relator was indicted by the grand jury of Harris County, charged with a violation of Article 1621b of the Penal Code of this state, as amended by Chapter 100, Acts of the 47th Legislature, Regular Session, which reads as follows:

"Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or to attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this Section shall be deemed guilty of a felony and, upon conviction, thereof, shall be punished by confinement in the State Penitentiary for not less than one year nor more than two (2) years.

Sec. 2. It shall be unlawful for any person acting in concert with one or more other persons to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person, acting either by himself, or as a member of any group or organization, or acting in concert with one or more other persons, to promote, encourage, or aid any such unlawful assemblage. Any person guilty of violating this Section shall be deemed guilty of a felony, and upon conviction thereof shall be pun-

ished by confinement in the State Penitentiary for not less than one year, nor more than two (2) years.

Sec. 3. The term 'labor dispute' as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment.

Sec. 4. The provisions of this Act shall be cumulative of all other existing Articles of the Penal Code upon the same subject, and in the event of a conflict between existing Articles and the provisions of this Act, then and in that event the provisions, offenses, and punishments set forth herein shall prevail over such existing Articles.

Sec. 5. If any section, paragraph, clause or provision of this Act is declared unconstitutional, inoperative, or invalid by any Court of competent jurisdiction, the same shall not affect nor invalidate the remainder of this Act.

Sec. 6. The fact that it is essential that industries of this State be protected from strikes and that all citizens of this State be protected from the use of violence in labor disputes creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days be suspended, and it is hereby suspended, and this Act shall be in full force and effect from and after its passage, and it is so enacted."

A capias was issued for the relator's arrest and he was taken into custody by the sheriff and confined.

On the 24th day of September, 1941, relator applied to this court for a writ of habeas corpus on the ground that he was illegally restrained of his liberty because:

(1) The statute above set out contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States,

(2) That it contravenes Sections 3, 8, 10, 13, 19 and 27 of Article I of the Constitution of the State of Texas, and violates Article 6 of the Penal Code of this state;

(3) That the statute is so indefinitely framed and is of such doubtful construction that it cannot be understood either from the language in which it is expressed or from some other written law of the State and is therefore inoperative as being a denial of due process.

We do not deem it necessary to set out the various constitutional provisions mentioned inasmuch as every one is familiar with them and a mere reference thereto is sufficient for an understanding of the relator's contention. However, we do deem it proper to set out Article 6 of the Penal Code which reads as follows:

"Whenever it appears that a provision of the penal law is so indefinitely framed or of such doubtful construction that it can not be understood, either from the language in which it is expressed, or from some other written law of the State, such penal law shall be regarded as wholly inoperative."

It is obvious from the foregoing statement that a proper solution of the questions presented calls for a construction of the statute under which this prosecution was initiated. Consequently the fundamental principle of statutory construction must be kept in mind. Every presumption is in favor of the constitutionality of an act of the legislative body of a state and the courts will not declare it invalid unless, in their judgment, it clearly and unmistakably comes within the inhibition of the Constitution. See Ex parte Mabry, 5 Tex. Cr. App. 93; Cooley's Const. Lim. (8th Ed.) Vol. 1, page 371; Black's Constitutional Law (3rd Ed.) p. 68, sec. 39; Graves v. Minnesota, 272 U. S. 425, 71 L. Ed. 331, 47 S. Ct. 122; 11 Amer. Jur. p. 792, sec. 130; Fort Smith Light & Traction Co. v. Board of Improvement of Paving District, etc., 274 U. S. 387, 71 L. Ed. 1112.

The authority of the legislature to enact laws designed to prevent crime and to prescribe adequate punishment for a breach thereof is not questioned here. The sole questions presented by the record are: (a) that the statute under which this prosecution is brought denies relator equal protection of the law and (b) curtails his constitutional right of freedom of the press, freedom of speech and freedom

of assembly; and furthermore, that the act is so indefinitely framed and of such doubtful construction that it cannot be understood either from the language in which it is expressed or from some other written law of the State.

We shall endeavor to discuss each of the contentions in the order above stated. It seems that the real basis for his first contention is that this statute which makes a person a felon who, by force or violence, prevents or attempts to prevent any person from engaging in any lawful vocation, even though the offending party does not know that the party assaultee is engaged in a lawful occupation, is void for uncertainty.

In support of his contention relator cites us to the case of Ratcliff v. State, 289 S. W. 1072. In this case the prosecution was initiated under Article 1094 of the Penal Code, which did not embrace the words "to prevent or attempt to prevent" as does the statute in question. Hence that case is of little, if any, aid to us in deciding the questions presented.

In Brill's Cyclopedia of Criminal Law, Vol. 1, p. 174, sec. 86, the rule is stated as follows:

"Whether or not a criminal intent is an essential element of a particular statutory offense depends upon the intent of the legislature, to be arrived at by a construction of the statute in question. Of course intent is essential where the legislature has incorporated into the statute a word or words descriptive of the offense which imply the necessity of a mind at fault before there can be a crime."

It seems to be the rule that where the offense is *malum in se*, the intent is an element of the offense and should be incorporated either by express words or by words which fairly include the word "intent" within their meaning. The statute in question contains words which, when given a common-sense construction, embrace the word "intent" within their meaning. No one could attempt to prevent a person from doing a certain thing unless he had the intent to accomplish that object and unless he knew that the person was doing or was about to do the act sought to be prevented. For example, A could not prevent or attempt to

prevent B from committing theft or burglary unless he knew that B was committing or was about to commit the act and that he entertained the intent to prevent it. Hence, A would necessarily have the intent to prevent the commission of the offense by B. Consequently the language of the statute clearly implies the intent. It is a well-recognized rule of statutory construction that the legislative intent must be ascertained from the legislative act. It is not necessary that certain words which constitute an element of the offense should be employed. It is sufficient if words of like import are used and which convey the same idea or have the same general meaning.

Relator also contends that the statute in question denies him the equal protection of the law and he seeks to illustrate his contention by making the following observation: If A strikes B, who is engaged in a lawful occupation in order to prevent or attempt to prevent him from engaging in a lawful vocation, he is guilty of a felony. Yet, if B strikes A who is not so engaged, he is merely guilty of a misdemeanor. Hence, the unequal protection of the law. To the casual observer this reasoning may seem plausible but a critical analysis will lead one to the discovery of a more far-reaching objective in the two offenses. When B assaults A, who is not engaged in a gainful occupation, the assault is directed primarily against the person, while A, who assaults B, who is engaged in a gainful occupation, the assault is not only directed against the person but against his vocation for the purpose of preventing B from pursuing his occupation and to deprive him of the fruits of his labor. It is obvious that the assault by A upon B under the circumstances stated, not only deprives B of his labor but in a measure affects the entire economic fabric of the country. Hence the act of A passes into a more serious class and justifies a greater punishment than the act of B. To hold that the law in question is in contravention of the Federal Constitution on the ground of unequal protection of the law would be creating a fertile ground from which an attack might be made on the law relating to robbery. A, who makes an assault upon B for the purpose of depriving him of some personal property, is guilty of a felony, but if B,

who assaults A, who has no personal property, deprives him of nothing and does not intend to deprive him of anything, and is therefore merely guilty of a misdemeanor. It is obvious that the classification of the offenses and the penalty prescribed for each is a reasonable exercise of legislative functions within the purview of the Constitution.

In the case of Ex parte Tigner, 132 S. W. (2d) 885, 139 Tex. Cr. R. 452, this court held that the equal protection clause of the Federal Constitution does not take from the State the power to classify in the exercise of its police power but admits of the exercise of a wide scope of discretion and avoids what is done only when it is without any reasonable basis but purely arbitrary. This case was taken to the Supreme Court of the United States and by that court affirmed. In that case many authorities are cited in support of the principle there announced.

In this state we have statutes governing simple and aggravated assaults. The punishment prescribed for aggravated assault is much more severe than that prescribed for simple assault. Article 1147 of the Penal Code provides, among other things, that if an adult male person strikes a female, he is guilty of an aggravated assault, but if the female strikes an adult male person, she is merely guilty of a simple assault. So, if an adult male person strikes a child, he is guilty of an aggravated assault, but if the child strikes the adult, he is merely guilty of a simple assault. This statute has not been held to be in contravention of the equal protection clause of the Federal Constitution.

In the case of Truax v. Corrigan, 257 U. S. 311, 66 L. Ed. 254, the Supreme Court of the United States held that it is not an invalid classification under the situation presented so long as the statute which classified did not authorize illegal acts. See also Senn v. Tile Layers Protective Union, 301 U. S. 467, 81 L. Ed. 1229.

Lewis' Sutherland Statutory Construction (2nd Ed.), Vol. 2, p. 729, lays down the following rule:

"A presumption is always indulged in favor of the constitutionality of an act, and that construction will be adopted which will sustain the act, where the language used

will permit such interpretation. In construction, words may be restricted or enlarged, according to the intent with which they are used, and their meaning as used may be gathered from the purpose of the enactment. And when necessary that which is implied as well as that which is expressed may be held to be included within a statute."

The same author, on page 980, section 528, announces the following doctrine:

"Courts will not by the strict construction of penal statutes defeat the intention of the law-maker. Where the intent is plain it will be carried into effect. It will not be evaded or defeated on the principle of strict construction. The principle will be adhered to that the case must be brought within the letter and spirit of the enactment, but the intent of a criminal statute may be ascertained from a consideration of all its provisions, and that intent will be carried into effect. Such statutes will not be construed so strictly as to defeat the obvious intention and purpose of the legislature.

'While all statutes pertaining to crimes and their punishment should be strictly construed, and nothing left to intendment, they should not be so construed as to thwart the evident will and intention of those who enacted them, where that intention is plainly and fairly deducible from the law itself.' "

Article 7 of the Penal Code provides as follows:

"This Code and every other law upon the subject of crime which may be enacted shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects; and no person shall be punished for an offense which is not made penal by the plain import of the words of a law."

Bearing in mind the foregoing rule for the construction of the penal statute above set out, what did the Legislature mean by the use of the words "according to the plain im-

port of the language in which it is written? The Legislature must have had in mind the meaning and general use ascribed to the word "import". Webster's New International Dictionary defines "import" as follows: "That which a word, phrase, or document contains as its signification or intention." Now, what is the signification of the words "to prevent or attempt to prevent" as contained in the statute under consideration? The words "prevent or attempt to prevent" means to "anticipate, forestall, to intercept, hinder, frustrate, thwart, to keep from happening." Consequently, we are constrained to give those words such a construction. This being true, the words "prevent or attempt to prevent" embrace knowledge and intent. To better illustrate our conclusion, we make the following observation: A attempts to prevent B from committing burglary. Can it be said that A could attempt to prevent it if he had no knowledge that B was going to commit the act? Can it be said that he could attempt to prevent it if he did not intend so to do? Could A prevent the doing of an act unless he intended to thwart or forestall it? It is obvious that he could not intend to prevent an act unless he knew that it was going to be committed. Hence the words "prevent or attempt to prevent" include within the scope of their meaning knowledge and intent. This being true, we think the statute is sufficiently definite to define the offense and should be sustained.

In the case of *Shipp* v. *State*, 196 S. W. 840, 81 Tex. Cr. R. 328, the appellant was convicted of an attempt to induce another to commit false swearing. This court, in discussing the meaning of the word "attempt" used language as follows:

"The authorities seem to be uniform that where an act is done with the intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit the ultimate crime, which in this connection would be perjury under the indictment. There are a great many authorities which might be cited to support this proposition, but it is deemed hardly necessary. The word 'attempt' may be defined as an intent to do a thing, etc."

In 12 Tex. Jur. p. 302, secs. 59 and 60, the word "attempt" is defined. We do not deem it necessary to quote all of said sections but only the most pertinent part thereof, which reads as follows:

"An attempt is an endeavor to accomplish a crime carried beyond mere preparation, but falling short of the ultimate design in any part of it. It has also been defined as an intent to do a thing, coupled with an act which falls short of the thing intended."

We believe that by analogy the case of *Brady* v. *Bartlett, et al.*, 56 Cal. 350, sustains the conclusion we have reached in this case. In that case the court said:

"It is averred in the defense setting up the matters alleged to be fraudulent, that, owing to the side agreement, the defendants 'were prevented from protesting against the said work, which they desired to do.' As to these averments, which were in issue, nothing is found at all. If the issue on these allegations is material, that is, if the allegations are requisite to make out the defense, the failure to find on it is an error, for which the judgment should be reversed, and the cause remanded, that a finding may be had on it. (Billings *v.* Everett, 52 Cal. 661). But it is strongly implied, by the averment above quoted, that the defendants were aware of the matters of alleged fraud in time to have protested against the work. If they were ignorant of them, how can it be truthfully said they were prevented from protesting? Webster, after giving two definitions of the verb 'prevent' (1st, to go before; to precede; 2nd, to be beforehand with; to get the start of; to anticipate; to forestall), which he says are *obsolete*, defines it to mean 'To intercept and stop; to hinder, to obstruct; to impede; to thwart.' It cannot be said that one is hindered, or obstructed, or impeded, or thwarted, unless an effort is made to accomplish that which is hindered, or obstructed, or impeded, or thwarted. When such an effort is made, and it is defeated by the act of some person, it can then be said to be prevented. It may be conjectured or inferred that the machinations of a per-

son would have defeated any effort to accomplish the end arrived at, but such an averment would lack the essential of a good pleading, unless it appeared clearly that the acts complained of could have no other result than to prevent."

Relator's second contention is that the statute in question is an infringement upon his fundamental rights comprised within the terms "freedom of liberty, freedom of speech and the right of assembly" and is therefore in contravention of the Fourteenth Amendment to the Federal Constitution. The statute in question does not prevent one from peaceably exercising and enjoying those freedoms so long as he does so in a peaceful and orderly manner. However, when under the pretense of exercising any of those constitutional guarantees he resorts to force or violence, he then steps beyond those constitutional boundaries, destroys the public peace and good order, becomes a transgressor upon the rights of his fellow men and assumes the responsibility for his wrongful acts. This seems to us to be such an elementary legal proposition that it needs no citation of authorities in support thereof. Force and violence are not sheltered by any constitutional provision. However, we believe that the case of Whitney *v.* State of California, 274 U. S. 356, 71 L. Ed. 1095, supports the conclusion herein expressed. The gist of the offense here denounced is the use of force and violence directed by one person against another who is engaged in a lawful vocation to prevent him from pursuing the same. Relator cites us to the case of Thornhill *v.* Alabama, 310 U. S. 88, 84 L. Ed. 1093, and Carlson *v.* California, 84 L. Ed. 1108, in support of his contention. We do not regard these cases as decisive of the questions herein presented. We think that the case of Milk Wagon Drivers Union of Chicago *v.* Meadowmoor Dairies, Inc., 85 L. Ed. 497, is more pertinent and far more illuminating to the questions under consideration than the preceding two cases mentioned.

Relator's third contention is that the statute in question is so vague, indefinite and uncertain that those who are subject to it are not informed as to what conduct on their part will render them liable to its penalties, in this, that it prescribes a punishment for one who, by the use of force or

violence, prevents or attempts to prevent any person from engaging in a lawful vocation, independent of intent or knowledge on the part of the offender. If intent and knowledge are not comprehended within the phraseology of the act, then there might be merit in his contention, but we have herein sought to demonstrate that intent and knowledge were inherent in the language of the act. A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil or mischief intended to be prohibited. It is our opinion that the evil intended to be prohibited here is sufficiently stated to convey to a person of ordinary intelligence what conduct on his part will bring him within the inhibition of the statute. It may not be amiss to here quote the well-recognized axiom that things which are equal to the same thing are equal to each other.

Relator also contends that the words "at or near any place where a labor dispute exists" are too uncertain and indefinite to apprise him of what is meant by the word "near" inasmuch as no rule is stated by which the distance may be ascertained so as to avoid offending against the statute. This may be true, but nevertheless, the statute may be upheld since the word "near" is not fatal to the other provisions thereof.

In the case of Moore *v.* State, 112 S. W. (2d) 194, we held that the use of such term in connection with the word "at" did not affect the balance of the act. The word "at" is synonymous with the word "on" and since the act provides that the invalidity of any portion thereof will not affect the validity of the balance, the statute is not invalid.

We do not wish to be understood as holding that the word "near", which is a relative term, is so indefinite as to invalidate the statute. The term "near" is defined by Webster as "within a little distance from; close or upon." It is our opinion that the word "near" means within the general sphere or scope of the labor dispute so that the offending party may accomplish his purpose and object. A person is deemed to be engaged in a lawful vocation who is on his way to or from the place where he is engaged to work.

In support of our contention we cite Ralph *v.* State, 148 S. W. (2d) 401; State *v.* Tibbetts, 205 Pac. 776, (in fact, p. 779, on motion for rehearing) where the words "vicinity", "locality", as well as "near the place" have been thoroughly discussed and numerous authorities cited.

Whether relator knew that he was "at or on" a place where a labor dispute existed at the time he resorted to the use of force or violence to prevent or attempted to prevent any one from engaging in any lawful vocation and whether he knew that the party assaulted was engaged in a lawful occupation, might be interposed as a defense. However, the words "knowing" or "knowingly" do not appear in Article 1150, P. C., commonly known as the statute making it an offense for one who operates an automobile upon the public highways of this state and strikes another but fails to stop and render all necessary aid, etc. This court held that want of knowledge that he had injured some one would excuse him and be a defense to the prosecution. See Scott *v.* State, 233 S. W. 1097, 16 A. L. R. 1420; Stalling *v.* State, 234 S. W. 919.

The position taken by the court in this case is supported by the Supreme Court of Michigan in the case of People *v.* Washburn, 280 N. W. 132, 123 A. L. R. 311, appeal denied, 83 L. Ed. 363.

Having reached the conclusion that the statute is valid, the relator is remanded to the custody of the Sheriff of Harris County.

Krueger, Judge.

(Delivered Dec. 10, 1941.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

Endorsements: No. 21883. Ex parte Jack Frye, Appellant, *vs.* The State of Texas, Appellee. Appeal from Harris County. Relator Remanded to Custody. Opinion by Krueger, Judge. Filed in the Court of Criminal Appeals, Austin, Texas, 12/10/41. Olin W. Finger, Clerk.

EXHIBIT "C".

FROM HARRIS COUNTY

No. 21,885.

EX PARTE TED SANFORD.

Opinion.

ON MOTION FOR REHEARING

In his motion for rehearing, appellant insists that we erred in the disposition made of the case originally. He presents nothing not discussed in our original opinion. We have again reviewed the case in the light of the contentions made by appellant, and are unable to agree with him.

The motion for rehearing is overruled.

Davidson, Judge.

(Delivered January 28, 1942.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

Endorsements: No. 21,885. Ex parte Ted Sanford, Appellant, *vs.* The State of Texas, Appellee. Appeal from Harris County. Appellant's Motion for Rehearing Overruled. Opinion by Davidson, Judge. Filed in the Court of Criminal Appeals, Austin, Texas, 1/28/42. Olin W. Finger, Clerk.

No. 1187. SANFORD *v.* HILL, SHERIFF. Appeal from the Court of Criminal Appeals of Texas. June 1, 1942. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Gorin* v. *United States*, 312 U. S. 19, 27–28; *Hotel & Restaurant Employees' Interna-*

tional Alliance v. *Wisconsin Employment Relations Board*, 315 U. S. 437. *Mr. Sewall Myer* for appellant. Reported below: 157 S. W. 2d 899.